UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

JOHN CHAVERS, Plaintiff, v. WASHINGTON STATE DEPARTMENT OF CORRECTIONS; JOSEPH D. LEHMAN; JOHN LAMBERT; DAVID A. HUTTON, M.D., CARLA SHETTLER; ROBERT STERNS; DENNIS WEAVER; JAKE DEMORY; and BRIAN MAGUIRE, all in their individual and official capacities, Defendants.	NO. CV-04-234-MWL ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On February 14, 2005, Defendant Hutton moved for summary judgment. **(Ct. Rec. 19.)** On February 25, 2005, the parties agreed to an extension of time for plaintiff to respond to the summary judgment motion. (Ct. Rec. 24.) The Court granted the agreed request. (Ct. Rec. 25.) On April 22, 2005, the parties consented to proceed before a magistrate judge. (Ct. Rec. 27.) Defendants other than defendant Hutton do not oppose his motion for summary judgment. (Ct. Rec. 23.) On May 11, 2005, plaintiff's counsel filed a memorandum opposing summary judgment and a statement of material facts. (Ct. Rec. 28, 29.) On May 18, 2005, defendant Hutton filed his reply. (Ct. Rec. 30.) The matter came before the

undersigned magistrate judge on May 31, 2005 for oral argument at defendant Hutton's request. (Ct. Rec. 21.)

The matter now before the Court is Defendant's motion for summary judgment of Plaintiff's §1983 civil rights claims. Defendant seeks summary judgment alleging: 1) he did not act with deliberate difference to plaintiff's medical needs in violation of the Eighth Amendment, 2) plaintiff failed to properly exhaust his administrative remedies as required by the Prison Litigation Reform Act (hereinafter, "PLRA"), and 3) defendant Hutton was not a state actor as required to establish a 1983 civil rights violation. (Ct. Rec. 19 at 2.)

I. Summary Judgment

When considering a motion for summary judgment pursuant to Fed. R. Civ. P. 56, the court's role is not to weigh the evidence, but merely to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Freeman v. Arpaio*, 125 F. 3d 732, 735 (9th Cir. 1997). Summary judgment is appropriate if, after viewing the evidence in the light most favorable to the party opposing the motion, the court determines that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Vander v. United States Dep't of Justice*, 268 F. 3d 661, 663 (9th Cir. 2001).

"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see*

also Anderson, 477 U.S. at 256.

A party opposing a properly supported motion for summary judgment must set forth specific facts showing that there is a genuine issue for trial. *Harper v. Wallingford*, 877 F. 2d 728, 731 (9th Cir. 1989). To establish the existence of a genuine issue of material fact, the non-moving party must make an adequate showing as to each element of the claim on which the non-moving party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 322-23. The opposing party may not rest on conclusory allegations or mere assertions, *see Leer v. Murphy*, 844 F. 2d 628, 631 (9th Cir. 1988), but must come forward with significant probative evidence, *see Sanchez v. Vild*, 891 F. 2d 240, 242 (9th Cir. 1989). The evidence set forth by the non-moving party must be sufficient, taking the record as a whole, to allow a rational jury to find for the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Where "the factual context renders [the non-moving party's] claim implausible . . ., [that party] must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary" to show that there is a genuine issue for trial. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587.

The materiality of facts is determined by looking to the substantive law that defines the elements of the claim. *Nidds v. Schindler Elevator Corp.*, 113 F. 3d 912, 916 (9th Cir. 1996).

II. Eighth Amendment

"It is undisputed that the treatment a prisoner receives in prison and the conditions under which [the prisoner] is confined are subject to scrutiny under the Eighth Amendment." *Helling v.*

McKinney, 509 U.S. 25, 31 (1993); *see also Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

Conditions of confinement may, consistent with the Constitution, be restrictive and harsh. *See Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *Osolinski v. Kane*, 92 F. 3d 934, 937 (9th Cir. 1996). Prison officials must, however, provide prisoners with "food, clothing, shelter, sanitation, medical care, and personal safety." *Toussaint v. McCarthy*, 801 F. 2d 1080, 1107 (9th Cir. 1986); *see also Johnson v. Lewis*, 217 F. 3d 726, 731 (9th Cir. 2000); *Hoptowit v. Ray*, 682 F. 2d 1237, 1246 (9th Cir. 1982).

When determining whether the conditions of confinement meet the objective prong of the Eighth Amendment analysis, the court must analyze each condition separately to determine whether that specific condition violates the Eighth Amendment. *See Cabrales v. County of Los Angeles*, 864 F. 2d 1454, 1462 (9th Cir. 1988) (subsequent history omitted); *Toussaint*, 801 F. 2d at 1107.

As to the subjective prong of the Eighth Amendment analysis, prisoners must establish prison officials' "deliberate indifference" to inhumane conditions of confinement to establish an Eighth Amendment violation. *See Farmer*, 511 U.S. at 834; *Wilson*, 501 U.S. at 303.

Deliberate indifference to a prisoner's serious illness or injury states a cause of action under section 1983. *Estelle v. Gamble*, 429 U.S. 97, 105 (1976); *see also Lopez v. Smith*, 203 F. 3d 1122, 1131 (9th Cir. 2000)(en banc). This rule applies to "physical, dental, and mental health." *Hoptowit v. Ray*, 682 F. 2d 1237, 1253 (9th Cir. 1982). In deciding whether there has been deliberate indifference to an inmate's serious medical needs, the

court need not defer to the judgment of prison doctors or administrators. *See Hunt v. Dental Dep't*, 865 F. 2d 198, 200 (9th Cir. 1989). State prison authorities have wide discretion regarding the nature and extent of medical treatment. *Jones v. Johnson* 781 F. 2d 769, 771 (9th Cir. 1986).

A serious medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. *McGuckin v. Smith*, 974 F. 2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds*, *WMX Techs., Inc. v. Miller*, 104 F. 3d 1133, 1136 (9th Cir. 1997)(en banc)(internal quotation omitted). The court should consider whether a reasonable doctor would think that the condition is worthy of comment, whether the condition significantly affects the prisoner's daily activities, and whether the condition is chronic and accompanied by substantial pain. *See Lopez,* 203 F. 3d at 1131-32.

Delay of, or interference with, medical treatment can also amount to deliberate indifference. *See Lopez v. Smith*, 203 F. 3d 1122, 1131 (9th Cir. 2000)(en banc). If the prisoner alleges that delay of medical treatment evinces deliberate indifference, the prisoner must show that the delay led to further injury. *See McGuckin v. Smith*, 974 F. 2d 1050, 1060 (9th Cir. 1992), *overruled on other grounds, WMX Techs., Inc. V. Miller*, 104 F. 3d 1133 (9th Cir. 1997) (en banc).

Negligence does not suffice. "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a

constitutional violation merely because the victim is a prisoner." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Even gross negligence is insufficient to establish deliberate indifference to serious medical needs. *See Wood v. Housewright*, 900 F. 2d 1332, 1334 (9th Cir. 1990).

A difference of opinion between the physician and the prisoner concerning the appropriate course of treatment does not amount to deliberate indifference to serious medical needs. *Jackson v. McIntosh*, 90 F. 3d 330, 332 (9th Cir. 1996).

Undisputed Facts

Defendant Hutton asserts that he gave plaintiff timely and extensive medical care. (Ct. Rec. 19 at 5.) He contends that because plaintiff fails to establish deliberate indifference to a serious medical need, he does not establish that the medical care he received amounted to cruel and unusual punishment under the Eighth Amendment.

Plaintiff is a paraplegic as a result of a gunshot wound in 1991. (Ct. Rec. 20-1 at 2.) His paralysis requires use of a catheter. (Id.) By June of 1999, the Foley catheter caused leakage, urinary tract infections, and the formation of two fistulas on the underside of Mr. Chavers' penis. (Ct. Rec. 20-1 at 3.) Plaintiff's WSP physician was Ronald Fleck, M.D. Dr. Fleck submitted a consultation request to the prison Utilization Review Committee (URC) and requested that urologist David A. Hutton examine plaintiff. (Ct. Rec. 20-3 at 4.) That request was designated by Dr. Fleck as urgent. (Id.) The URC approved the referral to Dr. Hutton. (Ct. Rec. 20-3 at 4.) Dr. Hutton examined plaintiff and decided to remove the Foley catheter and then

perform a clean intermittent catherization to solve the leaking, prevent further deterioration of the penile shaft and prevent formation of further fistulas. (Ct. Rec. 20-1 at 5.) Dr. Hutton stated that a suprapubic cystostomy, urinary drainage and cystoscopy would be needed. He opined that repair of the fistulas could be performed after the other procedures to allow the urethra to heal and inflammation to subside. (Id.) The URC approved Dr. Hutton's requested treatment plan and procedure on June 30, 1999. Dr. Hutton performed surgery to remove the Foley catheter on July 8, 1999. (Ct. Rec. 29-3 at 23; Ct. Rec. 20-1 at 2-3, 6.) The repair of plaintiff's fistula was approved by the URC. (Ct. Rec. 20-3 at 9.) On January 31, 2000, Dr. Hutton performed surgery to repair the two fistulas. (Ct. Rec. 20-1 at 7.) A follow-up exam revealed that the proximal fistula was successfully repaired, but the distal fistula broke down. (Id.) On April 12, 2000, Dr. Hutton attempted a second, ultimately unsuccessful, repair. (Ct. Rec. 20-1 at 7-8.)

Mr. Chavers desired a third surgery to attempt repair of the distal fistula. Dr. Hutton believed that such a surgery would be more extensive and he did not feel capable of performing it. (Ct. Rec. 20-1 at 9.) Dr. Hutton recommended that plaintiff see another urologist with more experience in this type of repair. (Ct. Rec. 20-3 at 13; Ct. Rec. 20-5 at 5) The URC requested that Dr. Hutton consult with another urologist. On August 10, 2000, Dr. Hutton conferred telephonically with urologist Dr. Steve Silverstein. Both doctors agreed a third surgery to attempt to repair the fistula was not medically necessary at that time since the suprapubic catheter was functioning well and plaintiff was not

able to use his penis for anything at all. (Ct. Rec. 20-1 at 9; Ct. Rec. 20-5 at 1, 2) After this consultation, Dr. Hutton advised Mr. Chavers that he felt a third operation was medically unnecessary. Dr. Hutton opined that any attempt at repair would require extensive surgery, including grafting, and would make Mr. Chavers prone to complications and recurrent fistula formation. (Ct. Rec. 20-3 at 17.) Dr. Hutton further opined that the location of the fistula - on the underside of the penis - did not present a risk of future injury. (Ct Rec. 29-4 at 14.)

Dr. Hutton's recommendation to the URC that a third surgery to attempt repair of the fistula was not medically necessary at that time is the basis of plaintiff's claim. The record in this case clearly demonstrates and, at oral argument the parties admitted, that the URC makes surgery and treatment determinations for inmates. In *McGuckin v. Smith*, 974 F.2d 1050 (9th Cir. 1992), the court noted that the defendant doctor was "to determine when and if surgery is needed," but that it was the prison referral committee and prison administrators who scheduled surgical treatments. The *McGuckin* court held that though the doctor was called upon to determine if surgery was appropriate, the doctor did not have the power to schedule the plaintiff for surgery. The court ruled that such evidence "does not provide a basis for a finding that either doctor was 'deliberately indifferent' to McGuckin's medical condition" and affirmed the grant of summary judgment to the doctors. *McGuckin*, 974 F. 2d at 1062. The ruling in *McGuckin* is helpful because plaintiff McGuckin's claim is similar to plaintiff Chavers'.

Dr. Hutton's recommendation to the URC whether further

treatment was medically necessary was a judgment call he had to make with respect to plaintiff's course of treatment. Dr. Hutton made his recommendation that a third surgery to attempt the repair was not medically necessary after he consulted with another urologist. The making of such a recommendation by itself by Dr. Hutton, based on the undisputed facts in this record, legally and factually does not establish extreme indifference on the part of the doctor.

There is no medical evidence of any serious medical need for the surgery. All of the medical evidence in the record before this court shows that the surgery desired by the plaintiff is not medically necessary. The undisputed medical evidence in the record is that except for its unsightly appearance, a fistula would only cause an inconvenience for someone who has use of his penis to empty his bladder or for ejaculation. It is undisputed that plaintiff can do neither because of his paralysis. Uncontradicted evidence establishes that the failure to have the third surgery would result in no further injury or pain. The only evidence of harm presented by plaintiff is that he worries and has nightmares about this condition on his penis. Plaintiff's worries about his condition however, do not make a third surgery to attempt a repair medically necessary.

Plaintiff contends that because he has a *fear* of future injury, Dr. Hutton's refusal to recommend a third surgery was deliberately indifferent to a serious medical need. (Ct. Rec. 29-1 at 2.) To show deliberate indifference, plaintiff must first establish a purposeful act or failure to act by Dr. Hutton. Dr. Hutton's recommendation against a third surgery is a

purposeful act but it was not one indifferent to the medical needs of the plaintiff. Dr. Hutton opined that the risky and complex nature of a third surgery, together with its cosmetic purpose, rendered this surgery medically unnecessary. Plaintiff must also show a resulting harm. As has already been noted the evidence is clear and undisputed that there would be no injury, deterioration of the condition or pain because of the failure to have the surgery. Because plaintiff fails to show harm resulting from Dr. Hutton's treatment, he cannot establish that Dr. Hutton treated him with extreme indifference.

Nearly five years have passed and there is no evidence that the plaintiff has suffered medical complications or problems as a result of not having the requested surgery. Examined in the light most favorable to the non-moving party, and giving the plaintiff the benefit of the doubt that the fistula does present a serious medical need, plaintiff's claim against Dr. Hutton would still fail because he has not shown deliberate indifference.

III. PLRA

The Prisoner Litigation Reform Act ("PLRA"), requires that prisoners alleging 1983 violations must exhaust their administrative remedies before seeking relief in federal court. See 42 U.S.C. 1997e(a). Defendants have the burden of raising and proving a prisoner's failure to exhaust under the PLRA. *Ngo v. Woodford*, 403 F. 3d 620, 625 (9th Cir. 2005). In this case, defendants admit that *Ngo* holds that the denial of an untimely grievance exhausts administrative remedies under the PLRA. (Ct. Rec. 30). Defendants concede that *Ngo* applies, although they note that there is a split of authority on this issue among the

circuits. (Id.) Applying this Circuit's precedent, Mr. Chavers, whose grievance was also denied as untimely, has exhausted his administrative remedies as required under the PLRA. However, it is of little consequence because he fails to establish a deprivation of his constitutional rights.

IV. State Actor

Defendant Hutton asserts that was not a state actor when he provided medical services to Mr. Chavers at WSP because he only provided medical services to inmates on a referral, rather than a contract, basis. (Ct. Rec. 30 at 7-8.)

To establish a 1983 claim requires: (1) a violation of rights protected by the Constitution or created by federal statute, (2) proximately caused (3) by conduct of a person (4) acting under color of state law. *Crumpton v. Gates*, 947 F. 2d 1418, 1420 (9th Cir. 1991). Generally, physicians who contract with prisons to provide medical services are acting under color of state law. *See West v. Atkins*, 487 U.S. 42, 53-54 (1988); *Lopez v. Dep't of Health Servs.*, 939 F. 2d 881, 883 (9th Cir. 1991)(per curiam).

In this case the Court need not decide whether defendant Hutton acted under color of state law because, as noted, plaintiff has failed to establish the first prerequisite of his civil rights claim: a constitutional violation.

The Court finds that plaintiff fails to set forth specific facts showing that there is a genuine issue of material fact for trial.

Accordingly,

Defendant Hutton's Motion for Summary Judgment **(Ct. Rec. 19)** is **GRANTED.**

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this Order, enter judgment for Defendant Hutton and furnish copies to counsel.

DATED this 6th day of June, 2005.

s/ Michael W. Leavitt

MICHAEL W. LEAVITT
United States Magistrate Judge